No. 73-920

JAN 28 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

LLOYD GEORGE KERNS, *Petitioner*

v.

SAMUEL J. JORDON, MAHONING COUNTY BOARD OF ELECTIONS, JOHN J. GILLIGAN, Governor of the State of Ohio, JOSEPH T. FERGUSON, Auditor of the State of Ohio, TED W. BROWN, Secretary of State of the State of Ohio, ANTHONY O. CALABRESE, SR., Member, Ohio Senate, and ROBERT A. MANNING, Member, Ohio House of Representatives, *Respondents.*

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The principal theme which runs throughout the two briefs submitted by Respondents is that Petitioner's action in the Ohio Supreme Court, which was enjoined by Judge Battisti, was an attempt to relitigate the issues decided by the three judge district court in *Jordon* v. *Mahoning County Board of Elections.* Indeed, this bald assertion appears so many times in the course of both briefs, it is as if Respondents believe they can make it so by simply stating it enough times. The record in this case is, however, absolutely clear on the two simple propositions which are central to Petitioner's argument: (1) The three judge district court in the *Jordon case* decided only the federal constitu-

tional issue raised in the complaint (the one man—one vote issue); and (2) Petitioner's action in the Ohio Supreme Court raised only the state constitutional infirmities of the 1971 reapportionment plan. Thus, this case involves a federal injunction against a state court proceeding in which only previously undecided state issues were involved. As such, the injunction is in brazen defiance of the Anti-Injunction Statute (28 U.S.C. § 2283).

The second proposition that Respondents offer is that Petitioner is politically motivated. We are confident that such a proposition does not lie easily in the mouths of Respondents. This Court has recently recognized that politics and legislative reapportionment are inextricably intertwined. *Gaffney* v. *Cummings,* 412 U.S. 735 (1973). In this case, Petitioner is a Republican legislator, four of the six Respondents are Democrat officeholders, and to date Respondents have successfully prevented the state constitutional deficiencies of the 1971 legislative reapportionment plan from being litigated in any court, including the three judge district court that heard the *Jordan* case. But what petitioner seeks is only the opportunity to have these infirmities reviewed by the Ohio Supreme Court, the court which has exclusive, original jurisdiction of such matters under the Ohio Constitution. As such, this case transcends Ohio politics; Petitioner's claims are legal, not political.

Two decisions cited by Respondents require comment. *Skolnick* v. *State Electoral Board of Illinois,* 336 F. Supp. 839 (N.D. Ill. 1971), is clearly inapposite to this case as it involved federal congressional redistricting. Moreover, the suit in the Illinois Supreme Court which was ordered terminated in that case did

not seek to vindicate rights under the state constitution, as did Petitioner's action in the Ohio Supreme Court, but rather sought to set aside a prior order of a federal district court. Inasmuch as Petitioner seeks only to raise the state constitutional issues which were not passed on by the three judge district court, no attack, direct or collateral, on the *Jordon* case judgment resulted from Petitioner's action in the Ohio Supreme Court.

Moss v. *Burkhart,* 220 F. Supp. 149 (W.D. Okla. 1963), involved the reapportionment of the Oklahoma legislature by a three judge district court after the legislature itself had failed to make the required reapportionment. Certain parties who had successfully intervened in the three judge district court proceeding filed an original action in the Oklahoma Supreme Court alleging substantially the same claims that were before the three judge district court. Under those circumstances, the three judge court enjoined the continued prosecution of the claims in the state supreme court that duplicated claims over which the three judge court had obtained jurisdiction (*see* 220 F. Supp. at 162). Obviously, the *Moss* case is not authority for the district court's injunction in this case.

Finally, Respondents make several specious arguments, each of which requires a brief response. For example, the brief filed on behalf of the apportioning persons asserts that the injunction of which Petitioner complains was not sought against the Ohio Supreme Court but rather against the litigants in that court. The prohibitions of the Anti-Injunction Statute, however, cannot be avoided by addressing the injunction to the parties rather than the state court. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of*

Locomotive Engineers, 398 U.S. 281, 287 (1970); *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.,* 309 U.S. 4, 9 (1940); *Hill* v. *Martin,* 296 U.S. 393, 403 (1935). By the same token, the attempted grafting of an additional exception onto the Anti-Injunction Statute that would ban its application in cases where federal jurisdiction is first invoked is contrary to settled law. *Atlantic Coast Line Railroad Co.* v. *Brotherhood of Locomotive Engineers, supra.*

A similarly misleading argument is that Petitioner, as a member of the original class in the *Jordon* case, is bound by the actions of the class representative in that case and should have raised objections to the three-judge court plan prior to its adoption. But, as we previously made clear (Petn. 8), class members were not permitted to intervene or otherwise to be heard prior to adoption of the plan. Moreover, the original class in the *Jordan* litigation was defined by the court as "all registered voters in Ohio." Petitioner is and was not a "registered voter" since he resides and votes in an area of Ohio where registration is not required. Indeed, it was not until June 11, 1973, some fifteen months after the three judge district court had relinquished jurisdiction of the *Jordon* case, and two months after Judge Battisti's restraining order, that Judge Battisti by a *nunc pro tunc* order expanded the *Jordon* class to include Petitioner and other non-registered voters.[1]

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[1]Respondents also make the curious argument—apparently in opposition to the Petition for Certiorari—that "the identical questions being raised by Petitioner in his Petition for Certiorari were before the United States Court of Appeals for the Sixth Circuit". Obviously, the same basic issue was before the Sixth Circuit as is raised in the Petition for Certiorari. Had that court ruled on the merits of Petitioner's argument, the Petition for Certiorari might not have been filed.

CONCLUSION

The briefs submitted on behalf of Respondents contain neither analysis nor authority which refutes the substantial claims made by Petitioner. The Petition for Certiorari should be granted.

Respectfully submitted,

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